LTD Ceramics, Inc. *and* Machinists District Lodge No. 190, Local Lodge 1584, International Association of Machinists and Aerospace Workers, AFL–CIO. Cases 32–CA–17605–1, 32–CA–17833–1, 32–CA–17990–1, 32–CA–18072–1, and 32–CA–178105–1

January 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On April 24, 2001, Administrative Law Judge Frederick C. Herzog issued the attached decision.[1] The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed cross-exceptions and a supporting brief. The Respondent filed an answering brief to the exceptions of the General Counsel and the Charging Party, and the Charging Party filed a response to the Respondent's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs, and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

The judge recommended dismissing the entire complaint, which alleges that the Respondent committed several violations of Section 8(a)(5) and (1) of the Act. The General Counsel and the Charging Party have excepted, inter alia, to the judge's failure to make explicit findings of fact and conclusions of law with respect to the allegation that the Respondent violated 8(a)(5) and (1) by unilaterally implementing a new attendance policy. The Charging Party has also excepted to the judge's failure to make explicit findings of fact and conclusions of law with respect to the allegation that the Respondent failed to provide the Union with relevant bargaining information. We find that the Respondent unlawfully implemented the attendance policy. However, we dismiss the allegation relating to the information request, and we find that the attendance policy violation did not affect the legitimacy of the Respondent's subsequent withdrawal of recognition from the Union.[3]

1. Attendance policy

Facts

On July 16, 1998, the Union was certified as the representative of a unit of production and maintenance employees at the Respondent's Newark, California facility. From July 16, 1998, to July 15, 1999,[4] the parties bargained without success for an initial contract. In June 1999, the parties reached tentative agreement on an attendance policy for unit employees, which incorporated a 4-step procedure proposed by the Respondent, with modifications proposed by the Union. At the June 16 meeting, the attendance policy was written up as a proposed appendix E to the contract. The Respondent's witnesses testified that after that meeting, employee-members of the union negotiating committee told unit employees that additional steps were going to be added to the attendance policy. Within a week, Don Sweetnam, the Respondent's vice president and chief negotiator, believing the Union had agreed to implementation of the attendance policy, instructed Robert Iles, the Respondent's human resources manager, to post and implement the new policy. The policy was posted by July 1. The Respondent began imposing discipline on employees under the policy within a week or two after the posting.

On July 1, Michael Munoz, the Union's chief negotiator, sent Sweetnam a letter stating in relevant part that:

> My recollection of our discussion regarding Appendix E was that we would respond. As you were aware our meeting was very short. If you would bring Appendix E to the next meeting I am sure, after proofreading it we can sign off. My copy was in the form of a company policy, signed by Bob Isles [sic]. I am sure you understand, since you are still proofreading many of the sections both parties are in agreement on. But we have not yet signed.

Later the same day, Sweetnam sent Munoz a reply letter stating in relevant part that:

[1] We have modified the case caption to conform to the consolidated complaint.

[2] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] For the reasons discussed here and in the judge's decision, we affirm the judge's finding that the Respondent did not violate Sec. 8(a)(5) and (1) by withdrawing recognition from the Union based on the petition presented to it on July 21, 1999. We further agree with the judge that the Respondent's lawful withdrawal of recognition requires dismissal of allegations of any subsequent 8(a)(5) violations.

[4] Unless otherwise noted, all subsequent dates shall be in 1999.

> Apparently, we misunderstood the union's position on our posting the agreed-upon appendix E. We now understand that the union position is that it had not agreed to its posting or implementation.
>
> [T] he company is willing to go forward with either the original Appendix E [the old policy] or the amended version. I asked the union today which it prefers, as we will abide by your choice.

There is no evidence that the Respondent ever removed its posting of the new attendance policy or ceased enforcing the new policy.

Analysis

We find that the Respondent's conduct in posting and implementing the attendance policy was unlawful. The Respondent argues that it made a good-faith mistake based on its misunderstanding of the Union's bargaining position. However, once the Respondent understood that the Union had not agreed to the proposal as posted, much less to its immediate implementation, the Respondent maintained the posting and applied the policy as posted while proposing to limit the Union's future bargaining alternatives to a choice between the new policy or the old attendance policy. By failing to rescind the new policy and return to unconditional bargaining about the attendance policy as part of negotiations for an overall agreement, the Respondent acted in derogation of its bargaining obligation and violated Section 8(a)(5).

2. Request for information

Facts

The complaint also alleged that the Respondent failed and refused to provide relevant information requested by the Union during bargaining for the purpose of monitoring the Respondent's compliance with a prior agreement about the recall of certain laid-off employees. The Union requested the information at issue, as well as other information, in letters to the Respondent on March 30, April 30, and May 6. It is undisputed that the Respondent provided much of the information requested in these letters, but there is a dispute about its response to requests for information about the department to which each employee was assigned, and the work groups in which each employee was qualified to work or unqualified to work, with a statement of the reasons why.

On May 7, the Respondent provided the Union a chart responding to the requests for the information at issue. The chart identified where employees were qualified to work based on present work group assignments. The chart only identified alternate work groups where employees were qualified to work if an employee had performed acceptable work in another work group in the past. With respect to work groups where employees were unqualified to work, the chart indicated "TBD" (To Be Determined) for all employees. In response to union queries, the Respondent's chief negotiator, Sweetnam, explained that it could not provide information about alternate work groups where employees were qualified or not qualified to work *until* employees had actually performed work in a particular group, thereby providing the Respondent with a basis for assessing qualifications. Sweetnam said the information would be provided later. Prior to the Respondent's withdrawal of recognition on July 21, there was no further request for this information and the parties did not discuss the matter in their continuing negotiations.

The Respondent did not provide any of the work group assignment information for its Research and Development (R&D) employees. Their inclusion in the unit was a matter of discussion between Sweetnam and Chief Union Negotiator Herman Howells. Sweetnam testified that the Respondent did not provide work group assignment information about the R&D employees because Howells and he agreed to exclude them from the unit in exchange for a union shop provision. He further testified that this understanding underlay the Respondent's subsequent dealings with the Union about the makeup of the unit. There is no evidence that, prior to the Respondent's withdrawal of recognition, the Union raised with the Respondent the issue of the omission of information about R&D employees from the May 7 chart. The Union did subsequently request the names of employees in the R&D work group, and the Respondent provided this information.

Analysis

We find that the General Counsel has not demonstrated that the Respondent refused to provide relevant information. At most, the record indicates there was some misunderstanding about the Union's expectations after the Respondent provided the data it had available on May 7. As the judge found, the Union apparently expected additional information about alternate work group assignments to be provided "in one lump" while Respondent planned to update the information on a serial basis whenever an employee changed work groups. As for the R&D employees, there is no basis to doubt the Respondent's good-faith reliance on its perceived agreement with the Union to exclude those employees. In any event, any misunderstanding about what information the Union still wanted from the Respondent could easily have been resolved by discussion during the parties' subsequent bargaining sessions or by any other form of communication. As indicated, however, there is no evidence that the Union raised the particular information

issue before us at any time after May 7, through the July 21 date of Respondent's withdrawal of recognition. Under these circumstances, we find that the Respondent did not refuse to provide information in violation of Section 8(a)(5).

3. Withdrawal of Recognition

Facts

On July 21, an employee presented the Respondent with a decertification petition signed by 97 of 171 employees in the bargaining unit. Forty-nine of these signatures were dated July 15, the final day of the Union's certification year. The rest were dated from July 16 to 20. On the basis of this petition, the Respondent sent the Union a letter withdrawing recognition on July 21. The judge found that the Respondent's withdrawal of recognition and subsequent refusal to bargain were not unlawful. The General Counsel and the Charging Party have excepted. As set out below, we agree with the judge.

Analysis

It is uncontested that the evidence of employee disaffection relied on by the Respondent privileged its withdrawal of recognition if there is no legal barrier to its reliance on such evidence. We find none. We are unwilling to conclude that the Respondent's reliance on a decertification petition received after the certification year is invalidated by the fact that some employees signed the petition on the final day of the certification year. In this regard, we agree with the judge, for the reasons set forth in his decision, that the circumstances of this case are quite different from those in *Chelsea Industries*, 331 NLRB 1648 (2000) enfd. 285 F.3d 1073 (D.C. Cir. 2002), in which the Board held that an employer could not withdraw recognition on the basis of a decertification petition signed by employees and received by the employer 5 months before the end of the certification year.

We further find, for the following reasons, that the Respondent's violation of Section 8(a)(5) and (1) by implementing a new attendance policy did not taint the petition. Evidence in support of a withdrawal of recognition "must be raised in a context free of unfair labor practices *of the sort likely*, under all the circumstances, to affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship itself." *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996) *(Lee Lumber II*), affd. in part and remanded in part 117 F.3d 1454 (D.C. Cir. 1997), citing *Guerdon Industries*, 218 NLRB 658, 659, 661 (1975) (emphasis added). In *Lee Lumber II*, the Board further noted that "[n]ot every unfair labor practice will taint evidence of a union's subsequent loss of majority support; in cases involving unfair labor practices other than a general refusal to recognize and bargain, there must be *specific proof of a causal relationship* between the unfair labor practice and the ensuing events indicating a loss of support." Id. (Footnote omitted and emphasis added.) The criteria for determining whether a causal relationship has been established include: "(1) the length of time between the unfair labor practice and the withdrawal of recognition; (2) the nature of the violation, including the possibility of a detrimental or lasting effect on employees; (3) the tendency to cause employee disaffection; and (4) the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union." *Master Slack Corp*., 271 NLRB 78, 84 (1984).

The General Counsel does not contend in his exceptions that the Respondent's unilateral change in attendance policy affected employee support for the Union. Even if the General Counsel had made this contention, it would have been without merit because the required "specific proof of a causal relationship" between the Respondent's unilateral change and the loss of majority support is wanting. While the unfair labor practice was relatively close in time to the withdrawal of recognition, there is no showing that it had a detrimental or lasting effect on employees, diminished the standing of the Union in their eyes so as to cause their disaffection, or adversely affect employees' morale, organizational activities, or union membership. We reach this conclusion because the unfair labor practice here involved the premature implementation of an improved attendance policy sought by the Union, tentatively approved by the parties in their contract negotiations, and described to unit employees by certain union negotiating committee members as a pending negotiated improvement.

For the above reasons, we are not persuaded by our dissenting colleague's view that the unilateral implementation of the attendance policy was sufficient to taint the decertification petition, and we find the cases cited by him distinguishable. In *Penn Tank Lines*, 336 NLRB 1066, 1067 (2001), the unilateral reduction in compensation followed on the heels of an agreement between the union and the employer to a pay raise for unit employees; in *Powell Electrical Mfg. Co*., 287 NLRB 969 (1987), enfd. 906 F.2d 1007, 1013–1014 (5th Cir. 1990), the respondent unlawfully declared impasse and implemented its final offer after only five bargaining sessions and little substantive bargaining. In our view, the implementation of a single policy sought by the Union over which the parties were close to agreement does not rise to the level of the unfair labor practices in either of the above cases.

In sum, the single unfair labor practice at issue here did not taint the petition. *Lee Lumber*, supra; *Master Slack*, supra. Accordingly, we find that the Respondent's reliance on the petition to withdraw recognition from the Union was lawful.

Our dissenting colleague says that the implementation of the new attendance policy, "in the general context of the Union's inability to get a contract," caused the erosion of support for the Union. However, he ignores the vital point that there is not even an allegation of bad-faith bargaining, and thus the inability to get a contract is not illegal. In short, this case involves only a single unilateral change. As to this change, our colleague acknowledges that there is a distinction between a general refusal to bargain and lesser 8(a)(5) violations. Only the former give rise to a presumption of a causal nexus between the violation and a loss of majority status. That sort of violation is not involved herein, and yet our colleague finds the causal nexus based on the mere "possibility" that the unilateral change affected employee support for the Union.

Our dissenting colleague also ignores the fact that the Union told employees that the Respondent's new policy was an improvement over the prior policy, and that the Union took credit for achieving this result in bargaining. In short, the evidence not only fails to support our colleague's view, it also affirmatively supports the contrary view.

Our colleague attacks this evidence as hearsay. Assuming arguendo that it is, we note that the Board has no hard and fast rule against hearsay, and this evidence was admitted without objection. Our colleague also says that the Union was not claiming credit for the change. The facts are that the Union sought an additional two steps in the disciplinary process, the Respondent acquiesced, and the Union told the employees of this acquiescence.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for the judge's Conclusions of Law 3.

"3. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing a new attendance policy applicable to unit employees in June 1999, at a time when the Respondent was obligated to bargain with the Union as the certified representative of bargaining unit employees.

4. The Respondent has not violated the Act in any other manner as alleged in the consolidated complaint.

5. The unfair labor practice set forth above affects commerce within the meaning of Section 2(6) and (7) of the Act."

ORDER

The National Labor Relations Board orders that the Respondent, LTD Ceramics Inc., Newark, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally implementing a new attendance policy at a time when it is obligated to bargain in good faith with the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facilities at Newark, California, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 1999."

Dated, Washington, D.C. January 30, 2004

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, concurring and dissenting in part.

I agree with my colleagues that the Respondent did not unlawfully fail to provide the Union with requested information in March-May 1999.[1] I also agree with them that the Respondent unlawfully unilaterally posted and

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] All dates are 1999 unless stated otherwise.

implemented a new attendance-discipline policy beginning in late June.

I do not, however, agree with my colleagues' finding that this unremedied unfair labor practice did not taint the employees' expression of nonsupport for the Union shortly thereafter, in mid-July. For the reasons discussed below, I would conclude that the unremedied unfair labor practice did taint the signatures on the decertification petition and therefore the petition could not legitimately be relied upon as the basis for the Respondent's asserted good-faith uncertainty about the Union's continued majority support. Consequently, the Respondent's July 21 withdrawal of recognition from the Union in reliance on the tainted decertification petition violated Section 8(a)(5) and (1) of the Act as alleged.[2]

1. Facts

The certification year was from July 16, 1998, through July 15, 1999. In late June, during negotiations for an initial collective-bargaining agreement, the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally posting a new 8-step attendance-discipline policy that the Respondent and the Union had still been discussing in contract negotiations and that had not been finally agreed upon. By July 1, the Respondent had implemented and begun imposing discipline under this new policy. On July 1, the Union notified the Respondent in writing that the Union had not agreed to the new policy. Although the Respondent then acknowledged its understanding that the Union had not agreed to the posting or implementation of the new policy, the Respondent never stopped posting and enforcing it.

The new attendance-discipline policy provided in pertinent part that employees would be permitted up to three unexcused absences every 6 months. The following discipline would be imposed after the third unexcused absence:

4th occurrence—verbal warning
5th occurrence—1st written warning
6th occurrence—2nd written warning; 3-day suspension
7th occurrence—3rd written warning; 5-day suspension
8th occurrence—discharge

There had been no written attendance-discipline policy prior to the unlawful implementation of this one. Discipline, if any, for unexcused absences was imposed by individual first line departmental supervisors, with inconsistent results. After the implementation of the new attendance-discipline policy, however, Respondent Director of Human Relations Robert Iles began to monitor attendance himself. He generated the verbal and written warnings that the supervisors actually issued. Thus, in mid-July, the employees were confronted for the first time with the implementation of a formal written policy of progressive discipline to which their collective-bargaining representative had not agreed and to which it immediately objected—to no avail.

On July 15, a few weeks after the Respondent unlawfully implemented the new attendance-discipline policy, and still during the certification year (albeit on the final day), 49 of the 171 unit employees signed the instant decertification petition. Forty-eight more employees signed over the next 5 days, through July 20. The petition was given to the Respondent on July 21, and the Respondent immediately withdrew recognition of the Union in reliance on the petition.

2. Analysis and conclusions

a. Applicable standards

An incumbent union's representative status cannot lawfully be challenged in an atmosphere of unremedied unfair labor practices that undermine employee support for the union.[3] An employer's unlawful conduct may be found to have undermined employee support for the union—and thus tainted and rendered unreliable a subsequent expression of employee rejection of a union—if a causal relationship between the unlawful conduct and the expression of rejection has been demonstrated.[4] The

[2] I do not agree with my colleagues that the General Counsel did not contend that the Respondent's unlawful change in attendance-discipline policy affected employee support for the Union. The General Counsel's brief in support of exceptions, fairly read, makes this contention. The General Counsel asserts there that:

> The judge found and concluded that the [decertification] petition was not invalidated because the majority of the signatures were placed thereon during the certification year and further concluded any unilateral changes by Respondent post withdrawal of recognition were not unlawful. The Judge failed to make any finding or conclusion whatsoever regarding the pre-withdrawal of recognition unilateral change to the attendance policy.

Similarly, the Union excepts to "the failure of the [judge] to take into account the fact that the employer committed numerous unfair labor practices [including, by implication, the unlawful unilateral change in attendance-discipline policy] during the one-year period prior to the withdrawal of recognition."

[3] See, e.g., *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), enfd. 310 F.3d 209 (D.C. Cir. 2002).

[4] Id. See also *Hotel & Restaurant Employees Local 19 v. NLRB*, 785 F.2d 796, 799 (9th Cir. 1986), affirming *Burger Pits, Inc.*, 273 NLRB 1001 (1984) (to taint a decertification petition there must exist an unfair labor practice prior to the withdrawal of recognition that would either affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship).

An employer's unlawful refusal to recognize or general refusal to bargain with the union are presumed to cause any employee disaffection from the union that arises during the course of the employer's

Board has identified several factors as relevant in determining whether such a causal relationship exists: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the violation, including the possibility of a detrimental or lasting effect on employees; (3) the tendency of the violation to cause employee disaffection; and (4) the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union.[5]

b. Application of standards

As for the length of time between the unfair labor practices and the withdrawal of recognition, the employees began signing the decertification petition on July 15, very shortly after the Respondent unlawfully unilaterally posted, implemented, and began to enforce the new attendance-discipline policy. As for the nature of the violation, including the possibility of a detrimental or lasting effect on employees, and the tendency of the violation to cause employee disaffection, no formal written attendance-discipline policy had ever before existed. In the past, individual first-line departmental supervisors had dealt with unexcused absences on their own. Now, Respondent Director of Human Relations Iles began to monitor attendance plant wide, generating verbal and written warnings that the supervisors actually issued. The Respondent's imposition of a new, formal system of progressive discipline, including suspensions and discharge, over the Union's express objections, and while the Union was at that very time still attempting to negotiate its first collective-bargaining agreement with the Respondent after 12 months of negotiations, could not help but have a detrimental effect on the employees' confidence in the Union's ability to represent their interests both at the bargaining table and away from it. The manifest erosion of employee confidence in the Union expressed in the decertification petition can reasonably be tracked, if not directly attributed, to the Respondent's unlawful implementation of a new attendance-discipline policy in the face of the Union's ineffective protest of that implementation, in the general context of the Union's apparent inability to get a contract even after a year's worth of negotiating. Where the Respondent's unlawful conduct showed its employees that their union was irrelevant in preventing the unilateral imposition of a system of progressive discipline, the possibility of a detrimental or long-lasting effect on employee support for the Union is clear.[6] By unilaterally changing the employees' terms and conditions of employment, the Respondent "minimize[d] the influence of organized bargaining" and "emphasiz[ed] to the employees that there is no necessity for a collective-bargaining agent."[7] Finally, as for the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union, there is no showing of employee disaffection for the Union *prior to* the Respondent's unlawful unilateral implementation of the new attendance-discipline policy.[8]

c. Conclusions

In light of the above considerations, the Respondent's unremedied unlawful conduct reasonably would have undercut the Union's support among the employees and led to expressions of disaffection from the Union, here in the form of a decertification petition submitted on the heels of the Respondent's unremedied unfair labor practice. Because the signatures on the petition were thus tainted by the unfair labor practice, the petition was rendered invalid as the basis for the Respondent's asserted good faith uncertainty about the Union's continued majority among the employees. Accordingly, the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union based on that tainted petition.[9]

unlawful conduct, and a causal relationship does not have to be demonstrated under that circumstance. *Lee Lumber & Building Material Corp.*, supra. Here, however, the Respondent did not refuse to recognize or generally refuse to bargain with the Union prior to July 21.

[5] *Master Slack Corp.*, 271 NLRB 78, 84 (1984).

[6] See *Penn Tank Lines*, 336 NLRB 1066 (2001) (withdrawal of recognition unlawful where based on decertification petition which was tainted by employer's unremedied unlawful (1) unilateral reduction of waiting-time and lost-time pay while the parties were still actively engaged in negotiations for an initial collective-bargaining agreement and just before employees began signing the decertification petition and (2) discharge of employee approximately 5 months before employees began signing the decertification petition); *Powell Electrical Mfg. Co.*, 287 NLRB 969 (1987), enfd. 906 F.2d 1007, 1014 (5th Cir. 1990) (unilateral implementation of contract offer without valid impasse contributed to employee disaffection and tainted petition on which withdrawal was predicated).

[7] *Penn Tank Lines*, supra, 336 NLRB at 1068, quoting *May Department Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945).

[8] Cf. *RTP Co.*, 334 NLRB 466 (2001), enfd. 315 F.3d 951 (8th Cir. 2003), cert. denied 124 S.Ct. 51 (2003) (employer had evidence of some disaffection with the union prior to its unlawful conduct).

[9] I am compelled at least to acknowledge my colleagues' attempt to avoid the results of the above analysis. They first set up a straw man—possible bad-faith bargaining by the Respondent—and then hurry to knock it down by pointing out that the complaint does not allege bad-faith bargaining or a general refusal to bargain prior to the allegedly unlawful withdrawal of recognition. But the question of whether the employees' support for the Union was undermined by the Respondent's unlawful unilateral posting and implementation of the attendance-discipline policy does not turn on whether that unfair labor practice was merely part of a wider course of unlawful conduct by the Respondent.

My colleagues also criticize me for ignoring the "fact" that the Union told employees that the Respondent's new attendance-discipline policy was an improvement over the prior policy, and that the Union took credit for this improvement. There is no such fact. There is no evidence that the Union trumpeted the Respondent's new attendance-

Finally, in light of the fact that the withdrawal of recognition was unlawful, the Respondent also violated Section 8(a)(5) and (1) of the Act as alleged by its admitted subsequent unilateral changes in unit employees' terms and conditions of employment. The Respondent admitted that these changes pertained to mandatory subjects of bargaining about which it otherwise had an obligation to bargain with the Union.

3. Additional matters

The Respondent unlawfully withdrew recognition of the Union, and the Respondent therefore was obligated at all material times to recognize and bargain with the Union. Consequently, I would remand the case to the judge for him to make findings of fact, conclusions of law, and recommended disposition of the presently unresolved allegations that *after* the Respondent withdrew recognition it unlawfully (1) granted semi-annual discretionary wage increases to unit employees; (2) terminated Jose Montero; and (3) failed to provide the Union with requested information that was relevant and necessary to the Union's performance of its duties as the collective-bargaining representative of the unit employees.

Finally, because I find that the signatures on the decertification petition relied upon by the Respondent in withdrawing recognition were tainted by the Respondent's unremedied unfair labor practice, I find it unnecessary to pass on the question whether, under *Chelsea Industries*, 331 NLRB 1648 (2000), even absent the unfair labor practice, the 49 signatures obtained on July 15, still could not properly be relied upon as a partial basis for the Respondent's asserted good faith uncertainty about whether a majority of the employees continued to support the Union because these 49 signatures were obtained prior to the expiration of the certification year on July 15. Thus, having found, contrary to my colleagues, that the Respondent's withdrawal of recognition was unlawful under a *Master Slack* analysis, it is unnecessary for me to pass on my colleagues' additional finding that the withdrawal of recognition was *not* unlawful under *Chelsea*.

Dated, Washington, D.C. January 30, 2004

discipline policy as an improvement, won by the Union. Respondent Vice President Don Sweetnam testified that (unnamed) supervisors told him that (unnamed) employees told the supervisors that (unnamed) employee members of the Union's negotiating committee told "all of" the employees that the Respondent had agreed to some changes to the existing attendance policy, and that there was going to be "two additional attendance rounds" (not further explained on the record) under the policy tentatively agreed to by the parties. Even apart from the crippling hearsay infirmity in Sweetnam's testimony, it makes no mention of any claimed improvement in the policy, or any claim by the Union for credit for any such improvement.

Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally implement a new attendance policy at a time when we are obligated to bargain in good faith with the Machinists District Lodge No. 190, Local Lodge 1584, International Association of Machinists and Aerospace Workers, AFL–CIO (Union).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

LTD CERAMICS, INC.

Gary Connaughton, Atty., for the General Counsel.
Charles E. Voltz, Atty., of Burlingame, California, for the Respondent.
David A. Rosenfeld, Atty., Van Bourg, Weinberg, Roger & Rosenfeld, of Oakland, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

FREDERICK C. HERZOG, Administrative Law Judge. This case was heard by me in Oakland, California, on various dates between August 1, 2000, and November 21, 2000, and is based on a charge filed on August 2, 1999, by Machinists District Lodge No. 190, International Association of Machinists and Aerospace Workers, AFL–CIO (Union), alleging generally that LTD Ceramics, Inc. (Respondent), committed certain violations of the National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.) (the Act). After several amended charges and consolidations of cases 32–CA–17605–1, 32–CA–17833, 32–CA–17990–1, 32–CA–18072–1, and 32–CA–18105–1, the Regional Director for Region 32 of the National Labor Relations Board

(the Board) issued the operative third order consolidating cases, amended consolidated complaint, and notice of hearing alleging violations of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act. Respondent thereafter filed a timely answer to the allegations contained within the operative complaint, denying all wrongdoing.

All parties appeared at the hearing and were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and file briefs. Based upon the record, my consideration of the briefs filed by counsel for the General Counsel (which was joined in by counsel for the Union/Charging Party), and counsel for the Respondent, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that the Respondent is a California corporation engaged in the business of manufacture and sale of ceramic material at its facility located in Newark, California; and that it annually shipped and sold goods valued in excess of $50,000 directly to customers located outside the State of California.

Accordingly, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is now, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

On July 16, 1998, the Union was certified as the exclusive collective-bargaining representative of Respondent's full-time and regular part-time production and maintenance employees employed by Respondent at its Newark, California facility. During the period from July 16, 1998, until July 15, 1999, the Union and Respondent engaged in negotiations for an initial collective-bargaining agreement and had many meetings toward that end. However, no agreement was reached prior to Respondent's withdrawal of recognition on July 21, 1999.

During negotiations, the Union requested information from Respondent. On March 30, 1999, the Union requested, by letter, the names of all unit employees and the departments to which each employee was assigned. On April 30, 1999, the Union requested, by letter, the date of hire of each employee, updated wage rate, the work groups to which the employee was both qualified and unqualified to work in and the reasons why, number of holidays worked by Respondent, and information on paid jury days. On May 6, 1999, the Union requested, by letter, the skill level and job title of each bargaining unit employee.

Mike Munoz, Director of Organizing for Machinists District Lodge 190, testified that Respondent had provided some of the information during the negotiation period and General Counsel clarified at hearing that there were only three types of information that were currently at issue as not having been provided in response to these requests. The unprovided information at issue included the areas an employee was unqualified to work (missing for all the employees) and alternate work groups for an employee (missing for some employees). In place of the missing information was "T.B.D." (to be determined). Also not provided, were the names and above information for the research and development employees. However, at hearing, the names of these employees were considered not at issue as Respondent had in fact provided this information.

There was a discussion of the missing information on or about May 7, 1999. Mr. Munoz testified that the Respondent indicated that it would furnish the information when Respondent had accumulated the information. Don Sweetnam, Respondent's vice president, testified that he was not aware of the continued dissatisfaction with the provided information. Sweetnam testified that he had explained to the Union that Respondent would not be able to make these types of work group determinations. He testified that each work group involves different skills and that Respondent could only list alternative work groups and unqualified work groups for an employee if the employee had actually worked in another area. Additionally, prior to Respondent's withdrawal of recognition, the issue was not requested again nor brought up at subsequent meetings.[1]

On February 26, 2000, the Union requested, by letter, a list of current employees including their names, dates of hire, rates of pay, job classification, address, phone number, date of completion of probationary period, and records of discipline. The letter also requested a copy of current company personnel policies, practices, and procedures as well as a statement and description of all polices not included therein, a copy of all fringe benefits plans, current copy of job descriptions, wage and salary plans, copies of all disciplinary notices, warnings, and records of disciplinary actions. Respondent admits that this information was not provided.

On July 21, 1999, Terry Agens gave Sweetnam a decertification petition containing 97 valid employee signatures from the 171 employees in the bargaining unit. Forty-nine of these signatures were dated July 15, 1999, and the remaining signatures were dated from July 16 to 20, 1999. On the basis of the decertification petition, Sweetnam sent a letter to the Union on July 21, 1999, withdrawing Respondent's recognition of the Union.

The central issue in this case is whether the withdrawal of recognition was unlawful because it was tainted either by Respondent's unfair labor practices, or by the alleged untimeliness of the decertification petition's signatures. All other issues raised by the parties depend upon the resolutions reached concerning this central issue.

As this issue was litigated, there was a significant amount of testimony at hearing regarding the conversations that were alleged to have occurred in the toolroom of Respondent's New-

[1] It is my opinion that they are both credible. I think it was merely a misunderstanding. I think Munoz thought he would get the information in one lump whereas Sweetnam thought whenever an employee worked elsewhere Sweetnam would update the list.

ark, California facility, and which are the entire basis for the allegations of unfair labor practices.

Dimitru Mazilu, an employee of respondent who worked in the toolroom, testified that he heard Billy Quan, another employee in the toolroom, speaking individually with several of Respondent's supervisors in the toolroom about the decertification petition in general and the specifics of the signatures attained or still required. Mazilu testified that he heard Billy Quan talking about these issues on separate occasions with Respondent supervisors Chuck Heidel, Tom Pineda, Sean Chim, Mike Smullins, John Bartlett, Ernie Garcia, Ralph Maldonado, and James Ragland during June and July of 1999.

The evidence adduced showed that the dimensions and layout of the room would have made it possible for Mazilu to have overheard or witnessed the events and conversations which he testified about.

Mazilu testified, with great apparent certainty, that he worked the swing shift from 12–8 p.m. and he testified that Quan worked the day shift from 7 a.m.–3 p.m. and that the conversations in question took place during this approximate 3 hour overlap when Quan and he worked together in the toolroom. Under cross-examination, however, a summation of Mazilu's time cards was put into evidence. The timecards showed that Mazilu actually started work at 2 p.m. during the dates in question. Mazilu then testified that he must have been mistaken about the time he started work. Later in the hearing, a summation of Quan's timecards were introduced into evidence showing that the overlapping time period between Quan and Mazilu in June and July of 1999 was only for approximately 1 hour each day.

Billy Quan credibly testified to the hours he worked with Mazilu. Quan denied having any conversations with Bartlett, Pineda, Smellins, Garcia, Chim, Heidel, Maldonado, nor Ragland about the decertification petition.

Also at hearing, Bartlett, Smullins, Pineda, Maldonado, Garcia, and Chim all credibly testified that they did not have conversations about the union nor the decertification petition with Billy Quan. In the end, the array and quality of testimonies presented to contradict that of counsel for the General Counsel's sole witness on the determinative issue, Mazilu, became so lopsided that I ruled that any further witnesses to the same facts would simply prove cumulative.

B. Analysis and Conclusions

It is well settled that an employer may lawfully withdraw recognition from a union that no longer has majority status, or where the employer has a reasonable good-faith doubt, based on objective considerations, of the union's majority status. *Laidlaw Waste Systems*, 307 NLRB 1211 (1992); *Market Place*, 304 NLRB 995 (1991). Employers may withdraw recognition from unions based on reasonable uncertainty of union majority. *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998).[2]

Here, Respondent received a petition from its employees indicating that 97 of its 171 bargaining unit employees no longer wished to be represented by the Union. Such a petition, bearing the signatures of a clear majority of Respondent's employees in the unit, establishes a reasonably grounded good-faith doubt, based on objective considerations, of the Union's majority status. *Brown & Root U.S.A.*, 308 NLRB 1206 (1992); See generally *A. W. Schlesinger Geriatric Center*, 304 NLRB 296 (1991) (employer received several pages of petition signed by employees and saw others; total number of signatures constituted a majority of unit employees).

However, the General Counsel asserts that the signatures and the petition may not be lawfully used by Respondent as a basis for withdrawal of recognition. She claims that is because they were not timely, i.e., that they did not occur following the expiration of the certification year.

Regarding the signatures, it is true that many were dated July 15, 1999, the last day of the certification year.

In order to foster collective bargaining and industrial stability, the Board has long held that a certified union's majority status ordinarily cannot be challenged for a period of 1 year. E.g., *Centr-O-Cast & Engineering Co.*, 100 NLRB 1507, 1508 (1952). In *Chelsea Industries*, 331 NLRB 1648 (2000), the Board recently stated its adherence to *Centr-O-Cast*, saying that "an employer may not withdraw recognition from a union outside of the certification year based on evidence *received* within the certification year."[3] 331 NLRB 1648. Clarification in *Chelsea* seems to indicate that an employer cannot withdrawal certification based on information collected during the certification year

In *Chelsea*, however, the employer was presented with a petition that had been signed and delivered to it in the seventh month of the certification year. In the case at issue, some of the signatures were collected during the last hours of the last day of the certification year. It is therefore not a question of months or days before the certification year has expired but a question of hours. I cannot, and do not, find that I can believe that the Board meant for its rules announced in cases such as Centr-O-Cast and Chelsea to be applied in such a rigid and mechanistic way as to void what I have found to be otherwise perfectly valid expressions of the employees' sentiments. The Board does not lightly make use of the doctrine of de minimus. But I believe that it would fault me if I were not to do so here. Accordingly, I find and conclude that the petition was not invali-

[2] Recently in *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), the Board changed the level of proof required for withdrawal of recognition stating that there is no basis in either law or policy for allowing an employer to withdraw recognition from an incumbent union that retains the support of a majority of the unit employees, even on a good-faith belief that majority support has been lost. Accordingly, we shall no longer allow an employer to withdraw recognition unless it can prove that an incumbent union has, in fact, lost majority support. *Levitz* additionally states that the burden of proof is on the employer to show actual loss. 333 NLRB 717. However, this standard will not be used in the case at hand as "we shall decide all pending cases involving withdrawals of recognition under existing law: the 'good-faith uncertainty' standard as explicated by the Supreme Court in *Allentown Mack*. *Levitz*, 333 NLRB 717.

[3] At another point in the decision, the Board speaks of evidence which is "acquired" within the certification year. And in Levitz, the Board spoke to the same issue, but used still another term, saying it would not permit evidence of disaffection to be used if it "arose" during the decertification year.

dated because some of the signatures thereon were placed there during the last hours of the last day of the certification year. Instead, I find that their prematurity was so slight as to be insignificant in this case, especially in view of the fact that, as found elsewhere herein, there is no basis to find that Respondent participated in or encouraged the gathering of the signatures on the petition.

Counsel for the General Counsel's sole witness to support the allegations of unfair labor practices and the claim that the signatures were tainted by supervisory participation in their collection was Mazilu. Thus, her case rises or falls entirely upon a resolution of Mazilu's credibility as compared to the array of witnesses presented by Respondent, set out above. For, unless Mazilu's credibility is found to be sufficient to preponderate over that of Respondent's witnesses, the General Counsel's case must be dismissed, for failure to sustain the burden of proof by a preponderance of the credible evidence.

Mazilu was not what one would all an unbelievable witness. Indeed, he made an initial good impression upon me. He gave the impression of a quiet, confident, studious, and precise young man. As he went through his testimony, he point by point clearly established a prima facie case for the General Counsel's allegations. If I noted any drawback in his demeanor it was merely that his confidence seemed at times to border upon arrogance or at least extreme rigidity. So, had the case ended following his direct testimony, I would have no difficulty in finding for the General Counsel in each respect alleged.

However, upon cross examination, my opinion of Mazilu's reliability was seriously down graded. As shown above, during his cross examination it was conclusively demonstrated that Mazilu simply could not have witnessed or overheard many of the events and conversations which he had testified to on direct examination. That is because he wasn't present at the times and places he'd earlier claimed to have been. Moreover, the time cards upon which he was cross examined proved that his opportunity to observe the events he'd testified about was significantly less than he'd earlier to. Yet, though forced to ultimately concede that his earlier testimony had been wrong, it was my observation that Mazilu remained just as unperturbed as he'd seemed earlier. Based upon this I finally concluded that Mazilu was simply one of those persons who furnish little or no clues by demeanor when they are unable to recall events accurately, or perhaps even fabricating.

As shown above, Respondent presented a veritable parade of witnesses, each of whom disputed Mazilu's testimony concerning events he claimed to have seen them engaged in. Nor did they simply do so with bland, or blanket, denials. They testified with precision, and obvious candor. I found each and every one of them quite believable in their demeanor, as well as in the facts to which they attested.

Thus, summarizing, based upon these findings I must find that counsel for the General Counsel has failed to prove the allegations in the complaint by a preponderance of the credible evidence. I so find and conclude.

Accordingly, the complaint shall be dismissed in its entirety.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not violated the Act as alleged.

Accordingly, I issue the following recommended

ORDER[4]

IT IS HEREBY ORDERED that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated at San Francisco, California, April 24, 2001.

[4] All outstanding motions, if any, inconsistent with this recommended Order are hereby denied. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.